One of the grounds of appeal by the learned Deputy Public Prosecutor was that the learned President was wrong in holding that the goods were customed.

The question whether goods on which some duty had been paid could nevertheless be said to be uncustomed for the purpose of establishing criminal liability appears to verge on metaphysics but with respect, it is not necessary that the question be put in this way. The accused had declared 910.7 yds., and paid the duty assessed on this yardage. But he in point of fact had taken delivery of 3,005.5 yards., an excess of 2,094.8 yards. This extra yardage had not been declared and cleared for importation. Duty had not been assessed or paid. In accepting delivery of this extra yardage the accused came knowingly into possession of these goods on which duty had not been paid, an offence under section 135(1)(g) of the Customs Act 1967 and punishable under section 135(1)(i).

In this connection, I should make clear that so far as criminality was concerned, the accused could only be and should be charged with failure to pay the duty assessed on the price as determined by the customs official at the post office and not at the price subsequently imposed. This must appear to accord with common sense and propriety, especially in the absence of any complicity on the part of this particular official in defrauding the government of the proper duty. If he, as the person with the primary duty of assessing the duty at the right valuation, set the price at $3.20 per yard, then duty should be paid at this price. If, as the customs contended, the correct valuation was $4.50 per yard, it was always open to them under section 17 of the Customs Act to claim for the extra duty on the difference of $1.30 per yard, by way of a civil demand, but this difference cannot clearly be the subject of a charge. This must be seen to be so, since the taxing code was the same, *i.e.* the rate of duty was the same.

The fact therefore is not that the accused had not paid any duty on the 3,005.5 yards imported by him, but that he had paid the duty at the valuation determined by a customs official on 910.7 yards only. This means, in other words, that the accused had not, on the prosecution evidence, paid any duty even at the valuation of $3.20 per yard on the balance of 2,094.8 yards. The charge should therefore have been amended to one of being knowingly in possession of goods, to wit 2,094.8 yards of cloth, on which duty had not been paid. The duty would be on a valuation of 2,094.8 yards X $3.20 *i.e.* on $6,703.36. Duty at 25% import duty, 4% surtax and 5% sales tax would come to $2,279.14.

That a duty lies not only on the part of the prosecution to amend the charge to fit with the facts of each particular case, there can, I conceive it, be no doubt; see, *inter alia*, *R.* v. *Cheah Teow Peng*.[1] In a proper case, the court could amend the charge: see *Ismail* v. *Public Prosecutor*.[2]

On this charge, the defence should have been called. The defence should be heard to explain, on a balance of probabilities that he was not knowingly in possession. It might be, as disclosed in cross-examination, a mistake ascribing the yardage of 910.7 yards from the later and still unarrived purchase of cloth in 25 bundles to the 90 bundles that had arrived. It might be that it was a genuine mistake. But the point is, the defence should be heard to explain why 910.7 yards were given as the yardage of the goods actually imported and the trial court should then determine whether the explanation, whether this or any other, was sufficient to establish, on a balance of probabilities, that no offence had been committed.

An opportunity was afforded to learned counsel for the respondent to make a further reply to the view I had taken and which I made known in open court at the first hearing. Counsel made a written submission and indicated he would not want to address me orally. With respect, his contention that the whole importation became customed goods disregards the facts of the case and ignores the basic fact that the importer had declared 910.7 yards but taken delivery of 3,005.5 yards.

The appeal is therefore allowed and the case is remitted to the learned President with a direction to amend the charge in accordance herewith and to call for the defence. I should add that an opportunity should be given to the defence to recall any witness who had given evidence for the prosecution for further cross-examination if desired by the defence, as required in such circumstances.

Appeal allowed.

KING HOCK CHING v. UNG SIEW PING

[O.C.J. (Tan Chiaw Thong J.) December 13, 1973]
[Sibu — Civil Suit No. 102 of 1972]

Probate and Administration — Letters of administration — Foreign grant — Authentication — Effective date — "Assets" — Meaning of — Administration of Estates Ordinance (Sarawak Cap. 80 of the 1946 Rev. Edn.), s. 14.

The plaintiff was suing in the capacity of an administrator of his late mother's estate. The letters of administration concerned were issued in Singapore. The defendant sought to set aside the writ for nullity. The issues before the court were: (a) whether the Singapore letters of administration confer title upon the plaintiff to sue as administrator of the estate of Madam King Mui Yin (deceased) without anything more being done in respect of it; and (b) whether a subsequent authentication of these letters of administration by a probate officer under section 14 of the Administration of Estates Ordinance (Cap. 80 of the 1946 Revised Edition of the Laws of Sarawak) confers such title upon the plaintiff, and if so, with effect from when?

Held: (1) the Singapore grant by itself conferred no title on the plaintiff to institute the action in this case as administrator of the estate of the deceased and the writ was therefore a nullity;

(2) an authentication made under section 14(1) of the Ordinance has the effect of a grant by the probate officer in respect of the assets of the deceased specified in the schedule to such authentication. Such authentication took effect from the day on which it was made and has no retrospective effect.

As the authentication here took place after the institution of proceedings in the case the plaintiff had no title to sue.

Meaning of "assets" discussed.

Cases referred to:-

(1) *Finnegan* v. *Cementation Co. Ltd.* [1953] 1 All E.R. 1130.

(2) *Burns* v. *Campbell* [1952] 1 K.B. 15.

(3) *K.M.N.SP.N. Valliammai Achi* v. *A.R.S. Nachiappa Chettiar* [1957] M.L.J. 27.

(4) *Ong Ah Ngim* v. *Lau Kiok Kia* [1956] S.C.R. 7.

(5) *New York Breweries Company* v. *Attorney-General* [1899] A.C. 62.

(6) *Ibrahim Sah* v. *Zahara Bee* 2 M.C. 130.

(7) *Meyappa Chetty* v. *Supramanian Chetty* [1916] 1 A.C. 603.

(8) *Haji Akhbar Khan* v. *D. Patel* [1960-63] S.C.R. 140.

CIVIL SUIT.

David Tiong for the plaintiff.

Chong Siew Chiang for the defendant.

Tan Chiaw Thong J.: The motion brought by the defendant before this court is for an order that the Writ of Summons in this action, and all subsequent proceedings to be set aside for nullity, with costs to be taxed and paid by the plaintiff to the defendant, on the ground that the plaintiff has no title to institute this action.

It is common ground that the plaintiff, King Hock Ching is suing in the capacity as administrator of the estate of his late mother Madam King Mui Yin (deceased). For the purposes of the Motion, it is also common ground that the Letters of Administration concerned was issued by the High Court of the Republic of Singapore.

The issues before this court are: —

(a) whether the Singapore Letters of Administration confer title upon the plaintiff to sue as administrator of the estate of Madam King Mui Yin (deceased) without anything more being done in respect of it; and

(b) whether a subsequent authentication of these Letters of Administration by a Probate Officer under section 14 of the Administration of Estates Ordinance (Cap. 80 of the 1946 Revised Edition of the Laws) confers such title upon the plaintiff, and if so, with effect from when?

On the first point, counsel for the defendant has submitted that the Singapore Letters of Administration confer no such title. It is a foreign grant and as such does not legally vest title upon the plaintiff in Sarawak as administrator of the estate of the deceased. For this submission, he has relied upon the English cases of *Finnegan* v. *Cementation Co. Ltd.*[1] and *Burns* v. *Campbell.*[2] However, an examination of these two cases would appear to indicate that on the respective material dates, the relevant law in force in England is section 169 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that if Probate or Letters of Administration granted in Northern Ireland are produced to the High Court in England, the grant shall be sealed with the seal of the principal probate registry and "shall have the like effect in England as if it had originally been made by the High Court". In the former case above, it was held, *inter alia*, that the fact that the plaintiff had obtained Letters of Administration in Ireland did not constitute her an administratrix for the purposes of section 2 of the Fatal Accidents Act, 1846, and therefore, she was not entitled to sue as such; and the latter case turns on the construction of the word "originally" as appeared in section 169 of the 1925 Act. The 1925 Act does not appear to have been mentioned in the former case.

Singleton L.J. in his judgment (at page 1133) said: —

"The person to whom letters of administration are granted in Ireland is not a person empowered by law to administer the estate of the deceased in England."

Jenkins L.J. in his judgment (at page 1137) stated: —

"The first question is whether by virtue of the grant of administration taken out by the plaintiff in the Republic of Ireland she can probably be held to bear the representative capacity of administratrix of the estate of her husband for the purposes of an action in the English courts. In my view, it is reasonably plain that the answer to that question must be "No". I think there is no escape from the conclusion that, whatever the position may formerly have been, at all events since the separation of Ireland from the United Kingdom a grant of representation under the local law of Ireland cannot be a grant for the purposes of an action in these courts."

As indicated earlier, because of the Supreme Court of Judicature (Consolidation) Act, 1925, it would seem that the *Finnegan's* case should be viewed in the light of the existence of the 1925 Act when this case was decided. It does not appear clear whether the *Finnegan's* case can be regarded as authority that on common law principles, a foreign grant cannot be legally regarded as a sufficient grant to the plaintiff of the right to bring an action in a representative capacity vested upon him by the foreign grant. Counsel for the defendant also cited the case of *K.M.N.SP.N. Valliammai Achi (f)* v. *A.R.S. Nachiappa Chettiar,*[3] which decided, *inter alia*, that a claim against a foreign executor, who has not obtained a grant of probate locally, cannot be maintained in his or her official capacity and, therefore, the third party proceedings against the appellant were a nullity and she was entitled to have such proceedings set aside *ex debite justitiae*. However, although in the course of argument it was submitted by counsel for the appellant that the same position applied if such foreign executor were to sue, as distinct from being sued, that point was not decided by the Court of Appeal in that case.

Rule 104 in *Dicey's* Conflict of Laws (6th Edition) states:

"A grant of administration or other authority to represent a deceased person under the law of a foreign country has no operation in England."

This Rule appears as Rule 93 in the 8th edition of the same work. The third proviso to this Rule in *Dicey* (at page 583 of the 8th Edition) states that —

" a foreign personal representative has a good title in England to any movables of the deceased (whether tangible, i.e. goods, or untangible, i.e. choses in action) to which he has in a foreign country acquired a good title under the *lex situs* and *reduced into possession*" (italics added).

This case concerns an ordinary contract debt, as disclosed in the pleadings, and the Comment (at page 584) under the above Rule states that —

"in the case of ordinary contract debts, the equivalent of reduction into possession is the obtaining of payment or a judgment against the debtor."

The comment in both editions under this Rule contains the following:

"Our rule is, in short, an application of the general principle that no person will be recognised by English courts as personal representative of the deceased unless and until he has obtained an English grant of probate or letters of administration" (see p. 450 of the 6th Edition of *Dicey* and p. 584 of the 8th Edition).

This Rule, therefore, would appear to have been based on a common law principle. If this is correct, the point for consideration, in my view, is whether this general principle of common law applies to this case despite the existence of the Sarawak Administration of Estates Ordinance. On the date when these proceedings were instituted, the Civil Law Act, 1956 of West Malaysia applied and still applies to Sarawak (see P.U.(A) 424/71). Section 3(1) of this Act provides, *inter alia*, that save so far as other provision has been made or may hereafter be made by any written law in Malaysia, which means any written law as defined in the law relating to interpretation in force in the relevant part of Malaysia, the court shall —

"(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to subsection (3)(ii)" (this subsection is not relevant here).

I have already expressed the opinion that the respective Rule in the two editions of *Dicey's* Conflict of Laws appears to be based on the general principle of common law that no person will be recognised by the English courts and likewise, in my view, this court, as personal representative of the deceased under a foreign grant unless and until he has obtained an English or local grant of probate or letters of administration, as the case may be. In the light of this, it remains to consider whether the Sarawak Administration of Estates Ordinance constitutes "other provision" within the meaning of section 3(1) of the 1956 Act and which has been made so as to oust the application of the above general principle of common law in Sarawak. In this connection, having regard to the definition of "written law" in section 2 of the 1956 Act, it is to be considered whether the Sarawak Administration of Estates Ordinance is a "written law" within the meaning of this definition which means that the definition of "written law" appearing in section 3(1) of the Sarawak Interpretation Ordinance (Cap. 1) should be considered. The first part of the definition of "written law" in the said section includes all "Ordinances" the definition of which in the same section would include the Sarawak Administration of Estates Ordinance. Even if it can be said that the first part of such definition should be read in the light of the second part, which in the instant case would have the effect of modifying the first part, which I doubt, I am still of the opinion, for the reasons given below, that the Sarawak Ordinance would come within the ambit of that definition, and therefore is a "written law" within the meaning of that expression in section 2 of the Civil Law Act, 1956. The second part of the definition of "written law" brings in the definition of "enactment", and reading these two definitions together, it may be argued that the Sarawak Interpretation Ordinance is not a written law within the meaning of the 1956 Act because it is not after the establishment of Malaysia a written law, since no authority in Sarawak is empowered to amend it. However, in my opinion, this will give an artificial meaning to the expression "written law" in the Sarawak Interpretation Ordinance. In my view, in construing this expression, the establishment of Malaysia should be judicially noticed and in construing that expression, regard should be had to Article 162(6) of the Federal Constitution as well as the definition of "Existing law" in Article 160(1) of the Federal Constitution. Taking these into consideration, I am of the opinion that the Sarawak Administration of Estates Ordinance (hereinafter called "the Ordinance") is a "written law" within the meaning of the Civil Law Act, 1956. To hold otherwise would mean that a whole lot of other Sarawak "written laws" which on the establishment of Malaysia became Federal laws and which fall to be construed under the Sarawak Interpretation Ordinance are excluded from such definition. Accordingly, on this basis, the further point to be considered is whether, because of the existence of the Ordinance, the application of the above common law principle under section 3(1)(c) of the Civil Law Act, 1956 is ousted in Sarawak for the purposes of this case. Section 14 of the Ordinance is the only section dealing with grants obtained elsewhere in the then British Empire. The Ordinance contains no provision as regards a grant obtained in a foreign country as distinct from a grant obtained elsewhere in the then British Empire. I shall come back to this section when I deal with the second point (b) above.

Counsel for the plaintiff has submitted that because the Ordinance contains no express provision relating to foreign grants, the Letters of Administration in this case which were issued in Singapore on the basis that it is a foreign country, should be regarded as sufficient to confer, for the purposes of this case, the status of administrator of the estate of the deceased given to the plaintiff by the Singapore grant. With respect, I do not think that can be correct. It seems clear that the intention of the Ordinance, particularly the intention of section 14 thereof, is that even where a grant is obtained in another territory which formed part of the then British Empire, an authentication of such a grant in respect of the assets in Sarawak of the estate of a deceased person is necessary. It can hardly have been the intention to give preference to a foreign grant, that is, a grant made elsewhere than in a territory falling within the then British Empire. Accordingly, I find it difficult to accept the submission of counsel for the plaintiff. In my view, unless there is clear and express provision in the Ordinance giving recognition to a foreign grant without anything more to be done in the State, the common law principle to which I have referred, applies. In other words, the existing provisions of the Ordinance do not have the effect of ousting the application of this common law principle in Sarawak. Accordingly, on the basis that Singapore is a foreign country, I hold that the Singapore grant by itself confers no title on the plaintiff to institute this action as administrator of the estate of the deceased and the Writ is therefore a nullity.

I now come to the second matter which calls for consideration, relating to the authentication of a grant under section 14 of the Sarawak Administration of Estates Ordinance. For the purposes of this ruling,

I am prepared to assume, without finally deciding, that the expression "British Empire" in section 14(1) shall be deemed to mean "the Commonwealth" and the expression "competent British Court" shall be deemed to mean "competent Commonwealth Court". Accordingly, under this section, where a grant of Probate or Letters of Administration has been made by a competent Commonwealth Court in any part of the Commonwealth which would include Singapore, and an authentication is made by the Probate Officer in accordance with this section covering assets in Sarawak of the estate of the deceased person, then by virtue of section 14(3), the holder of a grant so authenticated shall have the same powers and be subject to the same liabilities and obligations as an executor or administrator under a grant of probate or letters of administration issued under the Ordinance. This section does not cover the case where there are no assets in Sarawak belonging to the estate of the deceased person. In this connection, the point for consideration is whether a right to bring this action is an "asset" of the estate of the deceased person concerned. If so, then this right is an asset of the deceased in Sarawak. In this connection, in the case of *Ong Ah Ngim* v. *Lau Kiok Kia*[4] it was held by the then High Court at Kuching that the right of action is part of the assets of a deceased's estate and that before a plaintiff can bring an action in pursuance of this right, it must have been vested in him. In that case, it was held, *inter alia*, that the right of action to sue for damages must be included in a grant of letters of administration before it could be enforced by an administrator. This part of the decision in that case turns upon the construction of the relevant provisions of the Ordinance which have not been amended up to now. With respect, I agree with the decision of the then High Court. Accordingly, in this case, the right of action to sue on the subject matter of this action must be shown to have been vested in the plaintiff as administrator when this action was commenced, since such a right forms part of the assets of the estate of the deceased. By this action the plaintiff seeks to enforce such a right, *i.e.* to sue the defendant so as to recover the money owing at such date into possession. Therefore, such a right being a chose in action, is an asset in Sarawak, and before the plaintiff can sue, he must have had the Singapore Letters of Administration authenticated under section 14(1) of the Ordinance. "Asset" is nowhere defined in the Ordinance. It is observed that section 5(a) of the Ordinance requires that, before a grant of probate or letters of administration is issued, the applicant shall swear an affidavit and inventory of "all property, assets and effects (not exempted under subsection (1) of section 4) of the deceased in, or recoverable in" Sarawak. Section 16(1) stipulates that any "asset" omitted from the inventory required by section 5(a), may be declared by a further affidavit. This would appear to indicate that "property" and "effects" are intended to be covered by the word "asset". Accordingly, I am of the opinion that "assets" in section 14(1), which do not exclude "property" or "effects", would appear to include them. This is entirely logical. That "property", in the ordinary sense of the word, include choses in action there can be no doubt. In *New York Breweries Company* v. *Attorney-General*,[5] the Lord Chancellor said (at page 69): —

> "... but if one comes to analyse its meaning, it is manifest that a great many things, choses in action, with which we are dealing are, in the ordinary sense of the word 'property', and capable of being treated, not indeed by physical handling, but by documents of title and instruments recognised by the law as transferring the title, the incorporeal right to sue (that is what is strictly comprehended in such phrases), documents which are capable of being enforced and treated as subjects of property."

It seems to me therefore that "assets" in section 14(1) include "property". In view of what has already been said above about the Ordinance being a "written law" within the Sarawak Interpretation Ordinance, that Ordinance therefore applies for the construction of the Ordinance. "Property" is defined in section 3(1) of the Sarawak Interpretation Ordinance as including choses in action. Hence the right here to sue on the alleged debt in order to reduce it into possession is "property" included in the meaning of "asset" in section 14 of the Ordinance. Therefore, it is necessary for the plaintiff to have the Singapore Letters of Administration properly authenticated to include this right of action by him in his official capacity as administrator of the deceased's estate.

I have been informed by counsel for the plaintiff that such an authentication has been made by the relevant Probate Officer in Sarawak on 11 December 1973, *i.e.* after the institution of the present suit. Counsel for the defendant stated that he was served with a copy of the document evidencing such authentication shortly before the hearing of the Motion. He submitted that such an authentication has no legal effect but counsel for the plaintiff has disagreed. Counsel for the defendant has not quoted any authority and the only authority cited by counsel for the plaintiff is the case of *Ibrahim Sah* v. *Zahara Bee*.[6] Both counsel did not ask for an adjournment to further consider the point. The *Ibrahim Sah's* case concerns the title conferred by a grant of Letters of Administration issued by the Singapore Court. The headnote reads:

> "The grant of letters of administration gives title to the person but until extracted he has not the document of title; if and when he gets the grant issued it relates back."

The major part of the report deals with submissions for both parties and the decision of the court merely consisted of the following: "Adrian Clark J. overruled the objection." As shown in the report of that case, the relevant grant was made by a court and the question with which the learned judge in that case was concerned was whether the title of the administrator given by the grant took effect from the date of the order of the court itself or from the date of the extraction of the order of the court, and it was held that upon extraction, there was a relation back. I do not think that this case can be considered as authority to support the contention of counsel for the plaintiff that under the Ordinance, an authentication made under section 14(1) has retrospective effect. In my judgment, unless there is express provision in the Ordinance itself, or it arises by necessary implication, or unless it has been judicially decided (counsel for both parties have not been able to find any such judicial authority nor have I been able to locate any), such an authentication has no retrospective effect. This is clear from applying the ordinary principles of law relating to the construction of statutes. That it seems clear that an

administrator, as distinct from an executor, derives his title as such from the grant of the letters of administration to him is shown by the case of *Meyappa Chetty* v. *Supramanian Chetty*.[7] The Judicial Committee of the Privy Council said (at pages 608-9): —

"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, *including all rights of action* vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see *Comyn's* Digest, 'Administration,' B.9 and 10; *Thompson* v. *Reynolds*, 3 C. & P. 123; *Woolley* v. *Clark*, 5 B. & Ald. 744."

This passage also confirms the view that personal property of a deceased includes all rights of action. In my opinion, an authentication made under section 14(1) of the Ordinance has the effect of a grant by the Probate Officer in respect of the assets of the deceased specified in the schedule to such authentication (see section 14(3)). There is nothing in the Ordinance to say that any such authentication shall have retrospective effect. The case of *Burns* v. *Campbell, supra,* would appear to support this view. Reference may also be made to section 158 of the Sabah Probate and Administration Ordinance (Cap. 109), which requires sealing of certain grants, and upon such sealing being made, the probate or letters of administration shall thereupon be of the like force and effect, and have the same operation in Sabah as if granted by the High Court. In *Haji Akhbar Khan* v. *D. Patel (f),*[8] it was held, *inter alia,* by the Court of Appeal sitting at Jesselton, that as the respondent's Indian certificate of representation had not been re-sealed at the time when she purported to act on behalf of the deceased's estate, the whole proceedings were a nullity from the outset. The subsequent re-sealing and registration of the certificate could not validate the proceedings from the outset. At page 144 in the same report, Sir John Ainley C.J. said: "It is quite clear that the re-sealing of Mrs. Patel's Indian certificate had no retrospective effect..."; and at page 147, Smith S.P.J. stated: "A nullity is a still-born thing and I do not think, on the authorities, that the subsequent re-sealing of Mrs. Patel's Indian succession certificate had the effect in law of resurrecting something that was dead." Hence, retrospective operation of a re-sealing or authentication (as in this case) under a statute can only arise if that is expressly provided for in the statute concerned, or arises by necessary implication. It is not possible to hold that such is the case here. Accordingly, even on the assumption that the authentication in this case has been properly made under section 14(1) of the Ordinance, I hold that such an authentication took effect from the day on which it was made and has no retrospective effect. On the information of counsel for the plaintiff that such an authentication was made on 11 December 1973, that is, after the institution of the proceedings in this case, it follows that on the date of the institution of these proceedings, the plaintiff had no title to sue. Accordingly, on this ground also, I hold that the writ is a nullity.

For the reasons given above, I hold that the defendant succeeds in his motion and I hereby make an order in terms as prayed for in the motion.

Order accordingly.

FOONG WENG TAT v. VU SIEW CHIN

[F.C. (Ali, Ong Hock Sim & Raja Azlan Shah F.JJ.) January 28, 1974]
[Ipoh — Federal Court Civil Appeal No. 80 of 1973]

Practice and Procedure — Summary judgment — Leave to defend — Doubt as to bona fides of defence — Leave to defend should be conditional — R.S.C. 1957, O.14.

In this case the appellant had brought an action against the respondent on a debt due under a written agreement. The appellant applied for summary judgment but leave to defend was given to the respondent and on appeal this was affirmed in the High Court. The appellant appealed to the Federal Court.

Held: as it had been shown that there was doubt as to the *bona fides* of the defence case, leave to defend should have been made conditional on the respondent depositing the amount claimed in court.

FEDERAL COURT.

Lim Kean Chye (*Miss Leow* with him) for the appellant.

H. L. Teoh for the respondent.

Ali F.J.: We allowed this appeal and now give our reasons.

The appeal arose out of an order by the Assistant Registrar, High Court Ipoh granting the respondent unconditional leave to defend the action against him. The claim is founded on a debt due from the respondent under a written agreement. The respondent admitted signing the agreement but denied liability on grounds, namely, lack of certainty, implied recission, a mistake of fact and a breach of contract by the appellant. The writ being specially endorsed and taking the view that there was no defence to the claim the appellant applied for summary judgment. In his affidavit he dealt with the various grounds of defence raised. On the defence allegation of breach of contract for having failed to hand over or transfer four shares in West Lake Timber Sendirian Berhad, he referred to a letter from the respondent dated January 23, 1971 in which she acknowledged receiving the share transfer forms of the four shares. In her counter-affidavit she said she could not remember signing the letter although she admitted that the signature was hers. Notwithstanding this point against her the Assistant Registrar made an order in the following terms:

"Unconditional leave to defend granted. (Issue similar to those in C.S.196/71. Security already furnished there). Costs in the cause."

The appellant appealed to the High Court asking that the order be made conditional. Wan Hamzah J. dismissed the appeal taking the view that there are triable issues to go to trial. He also said that there was no evidence to show that the defence was a sham. In cases of this nature it is well established that sum-